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CAN THE GERMAN WORKMEN'S INSURANCE LAW BE ADAPTED TO AMERICAN CONDITIONS?

The Industrial Accidents Commission of the State of Pennsylvania has drafted and published a bill to provide compensation for injured workmen, which is modeled after the English law. Soon after such publication there was presented to that commission on behalf of the Pennsylvania Manufacturers' Association a proposed workmen's compensation act, modeled after the German law. Thereby a clear issue was presented as to the relative merits of the English and German systems of compensation for work-injuries, and as to their comparative adaptability to conditions in America.

In this paper, I will endeavor to present the arguments in favor of the choice of the English system as the model for us to follow.

The English law is comparatively simple and its operations are readily comprehended. The German law, on the contrary, is extremely complex, and it is difficult to acquire a correct understanding of the sum of its essential details. In explaining the two laws, therefore, it will be necessary to dwell at greater length upon the German law, so as to elucidate its weaknesses and dangers and the difficulties in the way of adapting any part of it to American conditions. We can then intelligently compare the respective merits and demerits of the two systems of compensation law.

The British "Workmen's Compensation Act, 1906" applies to wage-earners in practically all employments. It replaces the Act of 1897, which applied to certain enumerated industries only, and the Act of 1900, which applied to agricultural employments. This Act imposes upon the employer a direct liability to compensate his employees for accidental injuries arising out of and in the course of their employment. Some enumerated occupational diseases are treated as injuries, and must be compensated for accordingly. The scale of compensation is approximately 50 per cent. of the estimated wage loss from injury, beginning at the end of the first week, and under conditions reverting back to the date of injury.

The statute does not relieve the employer from liability for full damages at Common Law, or from liability for limited damages under an earlier statute; but those liabilities are incurred only where the employer or a vice-principal has been guilty of serious and certain fault, and they are practically negligible.

The employer may insure or not, at his option. If he does insure, the insurance does not relieve him from his individual liability.

Disputes may be settled by arbitration—either by a standing board voluntarily organized by an employer and his employees or otherwise,—or by a judge of the proper County Court, sitting as arbitrator and under summary procedure.

An employer and his workmen may by agreement substitute a scheme of mutual benefit insurance in place of the law, provided that the benefits to the workmen thereunder are equivalent to their benefits under the law, plus their contributions if any.

The German "Workmen's Insurance Law" (codified in 1911), is divided into three branches:

The Sickness Insurance Law.

The Accident Insurance Law.

The Invalidity Insurance Law.

This system of social insurance legislation was in large part a development of old established usages and institutions. Workmen's sickness insurance associations were quite general throughout large parts of Germany, and the Sickness Insurance Law simply made such insurance universal and compulsory, and re-

quired employers' contributions. And the requirement of employers' contributions is based upon a pre-existing *legal liability* of employers in many occupations to care for their sick employees, a liability similar to that which exists in our maritime law. And, similarly, the Accident Insurance Law is, to a degree, a development and amendment of the pre-existing Employers' Liability Law.

The sickness insurance is the basis of the entire system. Although it provides for the care of the sick for twenty-six weeks only, yet it disburses annually more than double the sum disbursed by the accident insurance. (In 1909, it disbursed 333,000,000 marks as against 161,000,000 marks disbursed by the accident associations). It takes care of injured workmen for the first thirteen weeks after accidents without expense to the accident insurance; and, under certain conditions, for further periods at the expense of the accident insurance. It thus relieves the accident insurance of nearly all care and expense relative to injuries lasting less than thirteen weeks.

These three branches of the Workmen's Insurance Law are so intimately correlated and interdependent, that we cannot extract the Accident Insurance Law by itself and then expect it to work satisfactorily. Both in theory and in practice, it is an organic part of a system and not an independent unit.

This code of laws is elaborately formulated (in over 1800 sections), is carefully framed and fitted to suit the peculiar usages and conditions in Germany, is founded upon a system of close control by Government over the conduct of individuals, and has been unusually well administered. In many respects, it has been highly successful, and as a whole deserves admiration and respectful consideration. But there are increasing doubts about its permanent success, and very serious difficulties and objections to applying it or any integral part of it to the radically different conditions existing in our country.

As to the accident insurance branch of the Workmen's Insurance Law: As originally proposed by Bismarck, it was to have been a bureaucratic state-insurance law, to be maintained by the *taxation* of employers and workmen. Under the criticism of jurists and industrial experts, however, it became, before enactment in

1884, a collective employers' liability law, secured by insurance in highly autonomous employers' trade mutual insurance associations, subject to state regulation. Workmen's contributions were omitted, except as received indirectly through the sickness insurance; and the German *Accident Insurance Law* now rests and always has rested upon a juridical principle of employers' liability for compensation as a substitute for employers' liability for damages in tort. That liability is the basis of the law; and the insurance is only an ancillary method of effectuating the purpose of the liability.

The Accident Insurance Law is sub-divided into three branches:

The Industrial Accident Insurance Law.

The Agricultural Accident Insurance Law.

The Navigation Accident Insurance Law.

These three laws do not cover wage-earners in all employments.

It is unnecessary to discuss the Navigation Accident Law. As to the Agricultural Accident Law, it is sufficient to note here that German experience shows that insurance of agricultural labor presents a problem radically different from that of insuring industrial labor; and therefore the German law devotes a distinct code of about 130 sections to it. The disposition of the American admirers of the German law seems to be to follow exclusively the Industrial Accident Law and to apply it generally to all employments. Therefore it is appropriate to elucidate particularly that branch of the accident law, so that we may understand the machinery and conditions requisite to its successful operation and may judge of its suitability for application to non-industrial employments.

With special provisions covering public employments, the Industrial Accident Insurance Law places the liability for compensation upon employers' trade mutual insurance associations, there being generally a separate association of all employers in each trade or group of allied trades throughout the empire, or in each of some large territorial divisions. Membership in the proper association is compulsory. These associations are highly autonomous. Some of them are divided into almost equally autonomous sections, the sections being substantially voluntary divi-

sions of the associations. There are 66 associations, comprising 593 sections.

Some have "branch institutes." These organizations are established in some trades to take care of the small irresponsible employers, who are likely to run up liabilities against the associations without adequate return. Members of branch institutes are charged premiums high enough to maintain "capitalized value reserves," and have little or no voice in the management of the associations.

Subject to governmental control and regulation, the associations or sections: (a) Have framed their own constitutions and make their own by-laws. (b) Fix the insurance rates charged to their members. (c) Make and enforce safety regulations. (The workmen have some representation in the conferences for the adoption of safety regulations.)

Except in the "Engineering and Excavating Association" and in the "Branch Institutes," the funds to pay the liabilities of the associations are raised upon the deferred assessment basis, without reserves to cover outstanding liabilities, but with provisions for small reserves to provide for emergencies and periods of depression.

Payments are made through the Post Office.

Benefits begin at the end of the thirteenth week after injury, and consist of periodical payments amounting to 66 per cent. of the wage loss upon wages up to \$428 and upon one-third of any excess. There are also some complex provisions for medical care, to be explained later.

The procedure after an accident is about as follows: In the first place the police investigate all injuries. The injured workmen are cared for during the first thirteen weeks by their sickness insurance associations, and thereafter—if still disabled—receive pensions and necessary medical care from their employer's accident insurance association. That association makes an *ex parte* investigation (to which witnesses may be subpoenaed, etc.), decides what it deems to be due the injured workman, and makes an offer of award. If that offer is unsatisfactory to the workman, he may appeal to the local insurance office (formerly to a Board of Arbitration); and from the decision of such office a second appeal lies

to the highest insurance office (of the Empire or of the State). Under certain conditions, the accident association may revise its award; and from that revised award a new series of appeals lies.

Some objections to and difficulties with the German Industrial Accident Insurance Law are:

(1) The correct marshalling of all employers and their organization into trade associations is a difficult task, and entails not only much initial trouble and expense, but also continuing disputes and litigation. All classifications by trades are necessarily arbitrary, and it is frequently a doubtful question in which of several associations a particular establishment rightly belongs. And between such associations there are often serious differences of rates. The matter of assignment to an association and of transfer from one association to another rests in the discretion of the Insurance Office. Consequently, there arise many disputes about assignments and appeals for transfers; and the officials are subject to political influences in regard thereto. And transfers entail serious difficulties and considerable injustice in the adjustment of outstanding liabilities as between the associations.

(2) The practice of the majority of the associations of omitting to maintain reserves to cover outstanding liabilities—the reserves maintained being sufficient merely for emergencies and periods of depression,—and of levying assessments sufficient only to meet payments falling due during the current year, incurs such serious economic danger and has so many inherent disadvantages that Germany alone has ventured to permit it. Its disadvantages and the objections to it are as follows:

(a) While it starts off with pleasingly low rates, it must eventually result in unduly high rates. The universal satisfaction at first felt with the German law was consequently ephemeral. That condition is passing. There are now some loud complaints from employers, and their dissatisfaction will increase, as rates continue to rise, as they must for many years to come. The rates in Germany today average about treble what they were in the beginning. It is calculated that they will not reach their stable maximum for some twenty years more. How much higher they will then be, no one knows, but the majority guess is that they will again double.

(b) This practice conceals the cost of insurance. No one knows what is the true cost of, as distinguished from the current

price charged for, insuring compensation in any given trade in Germany today.

(c) This practice once embarked upon, the law cannot be changed without serious embarrassments; for there will be heavy liabilities to be liquidated. The figures for the *industrial associations* alone are not available; but the outstanding capitalized liabilities of all the German accident associations in 1910 were estimated at \$271,900,000, their reserves at \$75,930,000, and their deficiencies at \$195,970,000. Our hazards and rates of wages being approximately double those of Germany, we can estimate the probable deficiencies under an application of this practice in America at about four times those of Germany, relatively to the number of workmen affected. Under the English law, on the other hand, there are no deficiencies to be liquidated, and that law could be radically changed tomorrow if deemed desirable, without disturbing existing insurance liabilities.

(d) This practice handicaps new establishments by compelling them to assume the liability for and to pay a material proportion of the losses of their pre-established competitors. And it imposes upon successful establishments the burden of liability for pensions for injuries incurred in establishments of defunct and insolvent competitors. It is obvious that if a large proportion of establishments in any trade should shut down the financial liability thereby shifted upon the survivors would be ruinous. In this respect the dangers and defects of the German industrial accident insurance are analogous to those of voluntary mutual life insurance.

(e) Finally, this practice is subject to the danger that the accumulated liabilities of the associations, which are in effect mortgages on the various branches of industry, may become so burdensome in a period of general and prolonged depression and contraction, as to crush the industries of the country or state affected in competition with the industries of other countries not similarly burdened. To meet the increasing cost of overhead charges for past indebtedness in a period of continued prosperity, rising prices and expanding industry is comparatively easy. But to liquidate a heavy indebtedness, carried over from the past, under opposite conditions is an entirely different matter.

(3) This law compels insurance where insurance is unnecessary, and thus imposes a useless expense merely to round out a paper scheme. Railroads and large companies with many separate establishments, having their assets and risks well distributed may properly meet their compensation liabilities as current expenses, and have no need of insurance. To force them into a mutual scheme is an imposition upon them.

(4) The arbitration provisions of this law result in far more litigation than the judicial procedure provided for in the English

law; and the process of adjustment with the insurance associations is more irritating to workmen than the direct negotiations with the employers or their insurers, which are the primary mode of settlement in England.

To compare the litigation under the German and English systems: In Germany, in 1909, there were 422,076 cases wherein compensation was awarded by the associations, of which 76,352 (18.9 per cent.) were appealed, of which appealed cases 22,794 (5.4 per cent.) were again appealed to the highest insurance offices. In Great Britain, in 1909, there were 335,953 new compensation cases. In all 8,254 cases (2½ per cent.) went to Court under the compensation law (besides 298 cases under the tort law). But of the compensation cases, the majority were settled by simple orders, etc., and only 4,105 (1¼ per cent.) were tried. Of these latter cases, 135 were appealed to the Court of Appeals (the majority upon the construction of the clause "arising out of and in the course of" the employment); 25 of which, however, were withdrawn. Only two cases went to the House of Lords.

Both the German and British experience under their compensation laws compares favorably with their previous experience under the tort law,—in spite of the fact that by the change from the law of "tort" to the law of "compensation" the total number of cases in which injured workmen are entitled to relief, and about which consequently litigation may legitimately arise, has been multiplied—in England at least—about nine or ten times.

The foregoing figures show how ridiculous are the frequent accusations of the critics of the English compensation law that it "has resulted in enormous litigation" and "fills the law reports with cases of statutory construction." They also show how unjustifiable is the belief, entertained by many of our advocates of compensation laws, that the substitution of official boards of arbitration or of administrative officers in the place of Courts of Justice would reduce litigation. Issues of law and fact would still arise, and would have to be tried very much in the old way, or injustice, abuse and general harm would result. To abandon the existing judicial machinery for a novel substitute, with its procedure, practice, precedents, etc., yet to be worked out, would be a perfectly useless change from one kind of Courts to another kind of

Courts, and would result simply in a duplication of expense. It should be borne in mind that the method of arbitration proposed is compulsory, by standing boards of political appointees, and would give none of the satisfaction of voluntary arbitration.

(5) The adjustment and final determination of awards by administrative officers has led in Germany to many abuses complained of, with some exaggerations perhaps, by Herr Friedensburg,¹ and later by Dr. Bernhard.² All the facts available indicate that the administration of the insurance law has been powerfully influenced by a desire to exercise liberality towards the unfortunate and governed by the spirit of benevolence rather than of law. Experience everywhere demonstrates that such a policy produces demoralizing effects and carries with it grave danger of fraud and abuse. With us, such questions as are involved in the making and review of awards always have been determined judicially, that is by Courts of Justice. And every lesson of experience is against depriving the parties affected of their rights to judicial determination of such questions; for administrative boards do not furnish adequate guaranty of impartiality or of strict adherence to law.³ The contention in mitigation, that the perversion of a law of private rights to purposes of public charity reduces the volume of necessary poor relief, is not supported by figures.

In Germany, this tendency to administer public charity out of private funds is to some extent checked by the powers of the employers' associations. But the prevailing idea of American imitators of the German law is to raise the insurance funds by *taxation*. Such funds would be *public* funds; and it is further their idea that the original awards against the funds should be made by political officers. Under such conditions, the rights of the employers' associations, in and to the funds or otherwise, would be far different and far less effectually safeguarded than in Germany.

(6) There are serious political dangers incident to the control

¹ "The Practical Results of Working Men's Insurance in Germany," Ferdinand Friedensburg, Translation, The Workmen's Compensation Service and Information Bureau, N. Y., 1911.

² "The Future of Social Policy in Germany," Ludwig Bernhard, Prof. of Pol. Science, University of Berlin, "Stahl und Eisen," Apr. 18, 1912.

³ Henry W. Farnam and Ernst Freund, in "Survey," N. Y., May 4, 1912, pp. 243, 245.

of the associations, of their funds and of the rate making. In the first place, the public functionaries having the regulation of the insurance, have the individual employers at their mercy; they may mould the constitutions and by-laws of the associations so as to favor their friends and ruin their enemies; in assignments to associations they can dispense favors; by their control over rate making they can likewise dispense favors and mar the whole scheme for accident prevention. In the second place, assuming that the public officials exercise their powers of control properly, there still remains the certainty of bitter political struggles, between the private classes affected, for the control of the associations—such control carrying with it the control of the common funds and of the rate making. This is best illustrated in Germany by the use that the socialists have made of their control of the sickness insurance associations as means for the propaganda of socialism, and the consequent struggle on the part of employers (aided by a minority of the workmen) to secure equal representation in the management of those associations, even at the expense of higher contributions. And even among the employers all is not harmonious; but the different classes of employers are constantly "wire-pulling" for control. The German policy has been to form the associations of as harmonious elements as possible; and as between the smaller and greater employers to frame their constitutions so as to give control to the latter. Will American politics permit the adoption of that policy? If not, the smaller will outvote the greater employers, and will unjustly impose the bulk of the cost upon them. Indeed, whichever horn of the dilemma we should elect, an industrial civil war would almost inevitably result.

In addition to the foregoing objections inherent in the German law is the further objection that it does not fit our local conditions, because:

(1) It is suited to a people who are accustomed to paternalistic governmental control of all their actions. It is impossible to explain—or for the average American mind to comprehend—the multitude and minuteness of the practices of this kind incident to the administration of the German law. But the following examples will serve to illustrate: Injured workmen are obliged to submit themselves to hospital or surgical treatment about as their

employers' associations may prescribe—subject to some check from governmental regulation. And employers are obliged to submit their private books and papers to the inquisitorial inspection of their competitors—if officials of their associations—and of public officials, almost without check.

(2) It depends for its success upon an elaborate system of police registration and surveillance, for which there is no substitute here. What the police do in Germany in the way of investigating accidents and injuries, identifying parties, checking frauds, exaggerations, etc., etc., would have to be done here by some equal force of equal efficiency, or the German scheme would here mis-carry.

(3) Its low cost of administration is due in part to the free use of the Post Office in making payments. In our States we would have to organize a large, separate force for that purpose.

(4) It has succeeded only through almost perfect administration of the governmental functions, and an unvarying imperial policy; whereas our administration is looser, and is apt to change its policy with changing party administrations.

(5) It is suitable only for a stable and homogeneous industrial population and stable industrial conditions, whereas our industrial population is fluid and made extraordinarily complex by immigration; and our small employers are constantly changing their industrial status—changing from the condition of employees to that of employers and *vice versa*, and changing their businesses.

(6) Germany is large enough, probably, to furnish an adequate distribution of risks in each trade association, without which distribution insurance as to employers is a mockery and a misnomer, and worse than no insurance at all. But probably no State in the United States is large enough to do that in all trades, and consequently, if the German scheme were followed, there would be many trade associations in which there would be too few establishments with too small aggregate assets to provide anything like adequate risk distribution. Truly unfortunate would be the plight of a responsible employer with a good business who should be forced into a blind pool with a few comparatively irresponsible competitors and saddled with a joint liability for the risks of all. A good illustration of this has already occurred under the Wash-

ington law, resulting from what is known as the Chehalis disaster.⁴

(7) The German scheme is suited to a state where employments generally are carried on continuously within the jurisdiction. But in each of our States there are many employers whose employees work irregularly part of the time within and part of the time without the State. Consequently, their premium rates would have to be adjusted so as to apply to each payroll only for the part of the time employed within the State. It would be a very difficult task to apportion the payrolls accordingly. And there would be many disputes, and many conflicts between the Courts of different jurisdictions in applying their different laws to transient and interstate employments.

(8) The German law shuts off all recourse to the Courts, and leaves every question arising thereunder to be decided by administrative officials. Under our constitutions that cannot be done; and according to the lessons of our political experience that should not be done.

(9) The German law compels every employer, to whom it applies, unconditionally, to enter into a contract of insurance with a specified mutual insurance association. Under our constitutions that cannot be done.

(10) The German Industrial Accident Insurance Law delegates to the trade associations the legislative power to enact rules and regulations for safety and to enforce the same in the establishments of their members by appropriate fines and penalties. This power is the principal factor for accident prevention in German industries. Under our constitutions such power cannot be delegated by statute. But it may be conferred by contract upon a voluntary mutual insurance association. And approximately equivalent results in the way of accident prevention are obtained in England under a system of insurance in private companies by a correct differentiation of premium rates according to hazards.

There remain to be considered a few difficulties and pitfalls in the way of an adaptation of the German Industrial Accident Insurance Law:

⁴ Cf. "A Novelty in Legislation," by Will G. Graves of the Washington Bar, Spokane, 1911.

(1) As stated above, that law is intimately correlated with the Sickness Insurance Law, which disposes of all injuries lasting less than fourteen weeks, without trouble or expense to the accident insurance associations. Without the sickness insurance, we would have to extend the accident insurance so as to compensate for injuries lasting over—say—two weeks. Such insurance would be concerned with a very much larger proportion of injuries than the German law—about 60 per cent. instead of 22 per cent.,—and would cover the class of short time injuries in regard to which impositions are greatest and the ratio of expenses of administration is highest. That difference would make all the experience of the German insurance as to cost, practice, etc., etc., inapplicable, so that in effect we would have to proceed without experience to guide us. It is vain to consider devising offhand a system of sickness insurance to serve as a basis for a system of accident insurance. For with our unstable and immigrant working population, sickness insurance is a problem infinitely more complex than work-accident compensation, and a problem such as no foreign country has ever solved.

(2) The Industrial Accident Insurance Law is designed and fitted to apply only to industrial employments (manufacture, transportation and construction). And the entire Accident Insurance Law does not cover all employments or even wage-earners in all employments; and it is not appropriate therefor. Consequently, if we are seriously to imitate the German example, we must prepare distinct and appropriate codes for industries, for agriculture, for maritime employments, for commercial employments, etc., respectively, and must accurately and in detail define the scope of these different codes, as conditions actually require. Nothing could be more contrary to the spirit of their asserted model than the crude schemes, applying sweepingly to all employments, that have been proposed in America as adaptations of this German law.

(3) The formation and organization of the compulsory trade mutual insurance associations is a problem that cannot be solved satisfactorily simply by prescribing what trades shall form separate associations, and then compelling employers to associate accordingly and to work out their salvation as best they may, under the dicta-

torial supervision of some state officials. Germany did not leap in the dark like that. Before the German law was enacted, the administrative regulations were fairly outlined and agreed to and the trade associations and their constitutions were tentatively formed or projected. Care was exercised to form the associations as far as possible of harmonious elements. The great Krupps works were made practically a distinct association. The policy adopted tended to give control of the associations to the "captains of industry." And the small employers, so far from being given equal voting power with their larger associates, in some associations have been relegated to "branch institutes," in the management whereof they have practically no voice at all. In fact, there are about a thousand details relating to the administration and regulation of the associations which in some way must be determined and settled in advance before this complex scheme can be put into operation successfully. And yet there is no indication that the American advocates of the German model have given them even the slightest consideration.

(4) In order correctly to follow the precedent of the Industrial Accident Insurance Law, it is necessary to distinguish carefully between compulsory mutual insurance and state insurance, and to avoid taxation and bureaucratic management—as distinguished from bureaucratic regulation and governmental assistance. The German industrial employer is liable to his association for "assessments" to pay a quasi-contractual liability—he is not taxed; the mutual associations' funds are private not public funds, and are managed by the associations, and not by public officials—although subject to public regulation; and the funds are disbursed by the associations, and not by public officials—although the Post Office assists. These distinctions are vital. And yet many in America think that they are imitating the German Industrial Accident Law, when they propose to resort to the exercise of the power of taxation to raise the insurance funds, and when they confide to public officials the management and disbursement of the funds. In fact, they are varying from essential features of their model, and imitating in part either the Agricultural Accident Insurance Law of Germany, or the Norwegian law. It is not within the province of this article to present the objections to these latter

laws. It is sufficient to say that the merits of the Industrial Accident Law of Germany cannot truthfully be claimed for either of them.

Now to turn to the alternative—the English precedent.

The English Workmen's Compensation Law, applied to industrial employments, would be the simplest and least experimental first step in the direction of wider social insurance; and yet in itself would entail no departure from our political principles and only a slight change in our juridical principles—and that change one which many of us believe is not fundamental.

It would remedy the one industrial evil which particularly calls for immediate relief—the injustice of our liability laws.

It would not interfere with the accustomed usages and liberties of our people.

It would adhere to our time honored practice of judicial determination of issues affecting private rights and liabilities.

It would avoid absolutely all the dangers and abuses of bureaucracy inherent in systems like the German.

It would avoid the political struggles over the control of trade associations and the management and disposition of mutual funds, inherent in the German system.

It would be a prudent experiment, adapted to further development or amendment; whereas the German system, once embarked upon, can never be departed from without the embarrassments of liquidating a heavy outstanding indebtedness.

Against the English law certain objections are currently insisted upon by some well-known publicists, who, on the other hand, give the German law unlimited endorsement. These objections will now be dismissed *seriatim*.

First: As to cost:

The critics referred to measure the cost of compensation by the rates of insurance. That leads into grievous error.

The English insurance rates cover the total cost. The German rates do not cover the cost of insurance—much of it is deferred. The *published* German rates do not cover the expenses of management; which are extra, and are assessed separately.

In addition to the cost to *employers* in Germany, there is a heavy cost to the *public*—and the cost to the public of an adapta-

tion of the German law would be higher in America. That cost would consist of: (1) The cost of a field and office force to supervise and regulate the associations, their rate-making, and the collection, investment and disbursement of their funds. (2) The cost of a great system of official boards of arbitration, with offices, clerks, etc. (3) The cost of a force to disburse payments and to exercise surveillance over claimants and pensioners. The total cost of these three forces, if adequate for their duties, would be an amount which the public would not tolerate; and if adequate forces were not provided the whole scheme would miscarry.

The argument is frequently advanced that because the German rates of insurance are lower than the rates charged for insurance of compensation under the recent law of New Jersey, and because the cost of management of insurance in private companies under our tort laws amounts sometimes to 65 per cent. of premiums, while the accredited cost of management in the German associations is only about 15 per cent., therefore insurance under the German method would be cheaper than insurance in stock companies of the direct liability for compensation.

These arguments are both quibbles. Taking them up in order:

The German rates are no indication of what our rates would be under the German method, because: (1) Our hazard is at least twice as great as the German hazard. (2) Our insurance would cover all injuries lasting over two weeks instead of those only which last over thirteen weeks; *i. e.*, about 60 per cent. instead of 22 per cent. of injuries. (3) Our expenses of management would be about three times greater than the German. Consequently, the comparison between the German and the New Jersey rates furnishes no indication of the relative cost of insurance under a scheme like the German and under the direct liability. The best indicator of the relative cost of the two systems of insurance is to compare the German with the English rates. Such a comparison shows that the English rates average a little lower than the German rates, *although the latter have not yet reached the stage where they cover the cost.* And looking further into the German rates, it is to be noted that the rates in Germany for some comparatively non-hazardous trades are inordinately high. For example, the rate for tanneries,

which in England is 0.75, in Germany is 8.23. Such startling rates in Germany indicate that there exist serious dangers in the German method of insurance.

As to the cost of management of insurance under the various systems: That cost under our *tort* liability is no indication of what the cost would be under a direct liability for *compensation*; and consequently it is wholly deceptive to compare that cost with the cost under the German system. The cost of management under a settled direct liability compensation law in England is about 36 per cent. The corresponding cost in Germany, it is claimed, is about 15 per cent. Nevertheless insurance in England is to be had as cheaply as in Germany. And the cost of administering insurance in America under an adaptation of the German law would be about three times as great as the cost in Germany, because here the scheme would lack the free assistance of the Post Office and of an all-pervading police force, and because it would have to deal with the short-time injuries, with which the German accident insurance is little concerned, and in regard to which the expenses of management are relatively highest.

Consequently, it is difficult to form any estimate of the cost of compensation insurance in America, particularly under an adaptation of the German system. But foreign experience gives us every reason to believe that the cost in America of a system of insurance in imitation of the German would be infinitely greater than the cost in Germany, and much greater, in the long run, than under an adaptation of the English law.

Second. It is objected to the English law that it does not tend to reduce accidents, whereas the German law does. Now it is almost certain, although not demonstrable, that generally both laws do tend to reduce accidents. Why then this invidious distinction? Because in England the volume and ratio of accidents have increased, while in Germany it is the opinion of experts that the law reduces accidents. But the volume and ratio of accidents have correspondingly increased in Germany; and it is the opinion of experts that the English law likewise reduces accidents. Apply the same test to both laws and they measure about the same.

A report, in 1904, of a Parliamentary Committee appointed to investigate the workings of the Compensation Act of 1897, in which

it was stated that the Committee could not see that that law had had any effect in accident reduction, is often cited against the English law. But expert industrial opinion is *contra*; and the doubtful finding by that Committee is explained by the dictum of the German experts that the effect of their law in the line of accident prevention could not be seen in statistics until it had been in operation fifteen years. And a later British Departmental Committee on Accidents has reported as follows (to quote the summary in the Annual Report of the Chief Inspector of Factories for 1910): "They find that while the accident risk probably remained almost constant in the decade 1897-1907, any increase due to extended use of machinery and greater pressure being counteracted by improved inspection and *by the greater care resulting from the Workmen's Compensation Act*, it has decreased since 1907, owing to the causes above named and to the experience of employers in the efficient guarding of machinery. They regard the increase of reported accidents up to 1907 as due almost entirely to improvement in reporting, which since that date has been less marked, so that the effect of *lessened risk* has shown itself in the statistics."

Strong testimony in favor of the efficiency of the direct liability law of Great Britain in the way of accident prevention may be found in the brief of Mr. John Calder, a leading industrial expert, filed with the Congressional Employers' Liability Commission,⁵ and in the testimony of Messrs. Gill and Clynes, M.P., before the New York Employers' Liability Commission.⁶

Third. It is objected to the English form of compensation law that it provides no security to injured workmen for the payment of their compensation. It is to be noted that this criticism is not included in the sweeping arraignment of the English law by Mr. Miles M. Dawson, in his brief filed with the Congressional Commission on Employers' Liability (1911); and the significance of this omission is that in actual experience in England, there has been almost no loss from the omission of any requirement of security.⁷ Looking at the subject practically, it is obviously far

⁵ Report of Hearings, Pt. 2, p. 768.

⁶ Minutes of Evidence, 1910, pp. 81, 89.

⁷ See testimony of Mr Gill, M. P., before N. Y. Employers' Liability Commission, Minutes of Evidence, 1910, p. 81.

more needful to require of employers security for their contingent liabilities for "damages" under our existing American negligence laws, than it is to require security for the contingent liabilities for compensation under the English law,—and yet we have never thought it necessary to do so. Why then merely because one liability is substituted for another should the addition of a requirement for security be deemed essential? It is true that accrued liabilities for long continuing pension payments under the compensation law subject the beneficiaries to the risk of their respective employers continuing solvent during such periods; but it is easy to require security for *accrued* liabilities without requiring general insurance in advance. It is also possible that dummy corporations may be resorted to to defeat the liability (a practice more probable in America than in England); but in that event a particular remedy can be adopted to meet that particular evil. It is also probable that in America compulsory security may prove to be advisable in some industries. It would be absurd, however, to subject all industries to unnecessary bureaucratic domination or to launch the state in an uncertain and expensive actuarial experiment merely to forestall the possibility of an abuse that has not arisen in actual practice.

Fourth. It is objected to the English form of compensation law that it starts with a maximum strain upon industries. The meaning of this is that, upon the adoption of such a law, employers, if they insure, must start in abruptly to pay premiums sufficiently high to establish reserves to cover the capitalized values of liabilities accruing during the period paid for—which premiums will undoubtedly be so much higher than the premiums for insuring the liability for negligence as to cause some embarrassment at first; whereas under the German system only payments due during the first year need be provided for by the first year's assessment-premiums, and the future payments upon accrued pension liabilities may be left to be provided for by future assessments; and the increase in premiums is thereby made gradual. But there are serious objections hereinbefore explained, to the German method: it is too much like issuing bonds to pay for current expenses. And it is to be noted that British industries have passed through the period of initial strain without material embarrassment, and

now have the advantage of solvent insurance. And it is also to be noted that all other countries except Germany have elected to meet the initial strain of the increased liability at once, without attempting to distribute it.

Fifth. It is objected to the English form of compensation law that it withdraws a maximum amount of capital from industries. This objection is simply a corollary of the proceeding, and means that the heavy premiums paid into insurance reserves are withdrawn from industry, whereas under the German system employers are allowed to retain and use in their industries a large part (*i. e.*, approximately that part not yet due and payable to the beneficiaries) of the moneys for which they are indebted for compensation. The economic theory underlying this objection requires demonstration; for it is the general opinion that the money paid for insurance reserves is not locked up in vaults, but is invested, and that a fair proportion of it finds its way back into industry.

Sixth. It is objected to the English law that it causes discrimination against the employment of the aged and defective. This is an evil of disputed proportions. That it exists at all is more generally denied.⁸ But it is more reasonable to suppose that employers do so discriminate considerably, not only because the aged are somewhat more liable to injury (as appears from the German statistics), but also and more particularly because accidents to elderly persons often lead to permanent disabilities caused not so much by the injuries as by old age, and which consequently obligate the employers to pay what are in effect old age pensions in addition to compensation for the injuries. It is difficult to form an estimate of the extent of this discrimination, because there is, independently of this cause, a universal preference for younger men in taking on new workmen, particularly in the more hazardous industries. If the objection is to be deemed material it may readily be avoided by minor amendment to permit old men, etc., to contract for a sliding scale of compensation, dependent upon age or certified infirmity, as is now being advocated in England. It cannot be avoided by adopting the German Industrial Accident Insurance Law, because that law by itself would cause about as

⁸ See testimony of Mr. Gill, M. P., before N. Y. Employers' Liability Commission, Minutes of Evidence, 1910, p. 76.

much discrimination as does the direct liability in England. It is the Disability Insurance Law and not the Accident Insurance Law that in Germany stills complaint of this discrimination.

Seventh. It is objected to the English law that it is not conducive to workmen's efficiency. It is commonly believed that during the past half century the average physique of the English working classes has degenerated, whereas the physical well being and efficiency of the German working classes have increased. And some of the panegyrists of the German law attribute this improvement in Germany to the Workmen's Insurance Law, and this real or supposed degeneration in England to its compensation law. There is only a modicum of truth in the former conclusion, and none in the latter.

While the German Workmen's Insurance Law has undoubtedly exerted a material influence in improving the contentment and well-being of the working classes and thereby in promoting workmen's efficiency, it does not follow that this result is due to the distinctive features of the *Industrial Accident* Insurance Law, so that the effect of the German system as a whole would have been any less beneficial had the direct liability for accidents been adopted instead of compulsory mutual insurance. And it is a tremendous exaggeration to attribute the growth in German efficiency so exclusively to the Workmen's Insurance Law alone, since widespread vocational training, compulsory military service, an iron discipline and early and wise child labor regulation are considered by many to have been the principal factors in bringing about that result. Moreover it is a vital mistake to attribute German industrial efficiency too much to the workmen. German managerial and technical efficiency were famous before the workmen's insurance laws, and are undoubtedly the ultimate cause of Germany's general efficiency and prosperity. And the more one studies the subject, the less becomes one's admiration for the German Workmen's Insurance Law in comparison with one's admiration for the administrative efficiency that has made those cumbrous statutes operate successfully.

Eighth. It is objected to the English law that it does not provide for the medical care of the injured. A comparison of the

different policies of the German, French and English laws, will aid to an understanding of this subject.

Under the German law, the employers' associations are obligated to provide medical care, etc., for injured workmen; but the control of the whole matter—including control of the patients—is given almost absolutely to the employers, subject to moderate state regulation. The employers' associations seem to have exercised their powers diplomatically, and the practice—except for some incidental abuses—has worked well, producing good results in the way of cures.

In France, the employer is liable for the cost of medical care, wherever necessary, but the injured employee has the choice of physician. This practice gives rise to many abuses, is uselessly expensive, and produces the worst results in the way of cures, etc.

The English law places no obligation upon the employer to furnish medical care, trusting that his self-interest to effect cures as soon as possible will induce him (or his insurer) to furnish proper medical care wherever necessary. The consensus of opinion seems to be that generally it has resulted as expected; but it does not cause due medical care to be given so universally as does the German law; and it has been construed to permit the expense of hospital care to be deducted from compensation benefits, which—generally—is wrong.

The choice, therefore, lies between the English and German practices. And it seems safer to follow the English practice, with some modifications, at first.

Ninth. It is objected to the English law that it has caused general dissatisfaction, whereas the German law, it is contended, is generally satisfactory. In discussing this proposition, it should be borne in mind that the comparison lies between the English Workmen's Compensation Act and the German *Accident Insurance Law*, and not between the English Old Age Pension, Sickness Insurance and Workmen's Compensation Laws, on the one hand, and the entire German Workmen's Insurance Law, on the other hand. And while as a whole and in many of its details the German system is the more perfect and the more generally satisfactory, yet the degree of satisfaction given by the *accident* laws of the two countries respectively is about equal.

The German Industrial Accident Insurance Law was at first extremely satisfactory to employers, on account of its low rates; but that cause of satisfaction has ceased, and as rates continue to rise, dissatisfaction among employers is increasing. On the other hand, the sudden and heavy increase in insurance rates caused by the adoption of the Compensation Act of 1897 in England at first made that law obnoxious to employers; but they have gradually got used to it, and now satisfaction with it is general, at least among industrial employers. No English employer with a well-equipped and well-conducted establishment would prefer the German law.

The attitude of labor towards these laws is complicated by socialism. In Germany non-socialist labor has generally been fairly satisfied, and the accident law has produced better relations between them and their employers. The socialists, on the other hand, were at first bitterly hostile to the insurance legislation, but have since become fairly satisfied with the sickness insurance. With the accident insurance, however, they remain dissatisfied, and demand a part in the management of the associations and benefits equivalent to 100 per cent. compensation regardless of fault. In England, labor generally has been satisfied with the compensation law.⁹ Recent declarations of British Labor Congresses against that law have been coincident with socialist control of those bodies. It is to be noted that the English socialists have not declared for the German law, but for a state-insurance law, awards to be made by political officers, and compensation to be on the 100 per cent. basis, with additional provisions for medical care, etc.

The impressions created upon American observers by the two laws respectively are not conclusive. All have been impressed by the completeness of the German system, and by the general excellence of its administration. But when it comes to the Accident Insurance Law and particularly to the question of its applicability to our conditions, opinion is divided. But the preponder-

⁹ See testimony of Messrs. Gill and Clynes, Laborite Members of Parliament, before the N. Y. Employers' Liability Commission, Minutes of Evidence, 1910, pp. 75, 76, 84.

ance of expert opinion is undoubtedly in favor of caution and of a trial of the English system.¹⁰

We should not be overimpressed by the encomiums on their law from the German officials. Naturally they are somewhat prejudiced in its favor; and they are the last persons who should be expected to cry aloud its weaknesses. The criticisms of such men as Friedensburg and Bernhard are sufficient to show that all is not satisfaction and perfection in Germany. That there is no like official chorus of praise for the British law is due solely to the fact that in Great Britain there is no established bureaucracy connected with the administration of its law.

From the foregoing the conclusion is obvious. For us to adopt substantially any integral part of the German Workmen's Insurance Law would be a leap in the dark—it would be making the welfare of our people the playfield of impulsive experiment, and would entail a radical change in our political principles and in our social and industrial habits and customs. Both the British and German laws, although in different ways and to different degrees, are products of gradual development. Even if our ideal be a system of broader and more perfect insurance than that provided by the British law, yet prudence dictates a course of gradual approach. The safest and most surely beneficial first step on that course would be the adoption of an adaptation of the earlier form of the British law.

P. Tecumseh Sherman

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¹⁰ See opinions of Farnam, Freund, Seager and Moot, in "Survey," N. Y., May 4, 1912, pp. 239, 243, 245.